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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 KUNSTLER, et al.,

4 Plaintiffs,

New York, N.Y.

5 v.

22 Civ. 6913 (JGK)

6 CENTRAL INTELLIGENCE AGENCY,
7 et al.,

8 Defendant.

-----x

Motion

9 November 16, 2023
10 2:30 p.m.

11 Before:

12 HON. JOHN G. KOELTL,

13 District Judge

14
15 APPEARANCES

16
17 THE ROTH LAW FIRM, PLLC
18 Attorneys for Plaintiffs

19 BY: BRIAN S. LEVENSON
20 RICHARD A. ROTH
21 ROBERT BOYLE

22 DAMIAN WILLIAMS
23 United States Attorney for the
24 Southern District of New York
25 JEAN-DAVID BARNEA
Assistant United States Attorney

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1 THE DEPUTY CLERK: Will all parties please state who
2 they are for the record.

3 MR. LEVENSON: Good afternoon, your Honor. This is
4 Brian Levenson from The Roth Law Firm for the plaintiffs. I'm
5 joined by Richard Roth of The Roth law Firm, and Robert Boyle,
6 of counsel to The Roth Law Firm.

7 MR. BARNEA: Good afternoon, your Honor. This is J.D.
8 Barnea from the U.S. Attorney's Office for the federal
9 defendants.

10 THE COURT: All right. This is a motion to dismiss so
11 I'll listen to argument. Mr. Barnea.

12 MR. BARNEA: Should I do it from here, your Honor, or
13 at the podium?

14 THE COURT: Whatever you wish. Whatever is more
15 convenient.

16 MR. BARNEA: Thank you, your Honor. As a tall person,
17 it is nice to have a little bit of a taller desk.

18 May it please the Court, your Honor, I would like to
19 focus the federal defendants' presentation today on a few key
20 arguments.

21 THE COURT: Before you do that, could I make sure that
22 I understand some things at the outset.

23 There are claims against former Director Pompeo, as
24 well as against the government. The claim or claims against
25 Mr. Pompeo are solely for damages under *Bivens*, and the claim

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1 against the defendant is for injunctive relief.

2 MR. LEVENSON: Yes, that's correct, your Honor.

3 THE COURT: Fine.

4 Second thing, at the outset, the government's
5 arguments for dismissal against Mr. Pompeo are 12(b)(6)
6 arguments. There is no *Bivens* claim. Even if there were a
7 *Bivens* claim, there is qualified immunity. There is no
8 standing argument with respect to Mr. Pompeo, and no other
9 12(b)(1) argument.

10 MR. BARNEA: That's correct, your Honor.

11 THE COURT: I ask that because I have to decide
12 12(b)(1) first. There is the standing argument against the
13 claim against the government, so with that, at least having
14 clarified things for me, go ahead.

15 MR. BARNEA: Thank you, your Honor.

16 So as I said, I'd like to focus the federal
17 defendants' presentation today on a few key arguments,
18 standing, as you just mentioned, the applicability of the
19 Fourth Amendment to the searches and seizures at issue, the
20 Fourth Amendment's reasonable expectation of privacy, and the
21 plaintiffs' *Bivens* claim against Mr. Pompeo.

22 On standing, plaintiffs' claim seeking injunctive
23 relief against the CIA cannot go forward because they allege no
24 ongoing or imminent injury.

25 Plaintiffs claim that the CIA was involved in searches

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1 and seizures that supposedly took place in 2017 and 2018 and
2 that, to their knowledge, nothing has happened to the seized or
3 recorded information in the intervening seven or eight years.
4 They do not allege that the CIA or anyone else has done
5 anything with the information since that time or imminently
6 plans to.

7 Even accepting plaintiffs' allegations as true,
8 whatever information was seized from them could easily be
9 sitting at the bottom of a file cabinet, entirely forgotten.
10 That is not enough to allege an ongoing or imminent future
11 injury as required by Article III. Even if the plaintiffs had
12 standing to bring their claim, they cannot allege a Fourth
13 Amendment violation.

14 THE COURT: By the way, they do allege an ongoing
15 concern that the information that's been seized can be
16 disseminated, and they want the return of the information now,
17 right? What controlling cases do you think stand for the
18 proposition that that's insufficient for standing?

19 MR. BARNEA: Well, again, the bedrock Article III
20 requirement for standing for seeking injunctive relief, forward
21 looking relief, is an ongoing or imminent injury.

22 Here, they hypothesize someone might do something with
23 their information, but they don't have any reasonable claims of
24 anyone imminently planning to do anything with that
25 information.

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1 THE COURT: My question really is what case or cases
2 comparable do you rely on for that are proposition? That the
3 government, having allegedly taken information, and still
4 keeping that information with the possibility that the
5 information can then be disseminated, and a party says you have
6 my information, I want it back. Your continuing detention of
7 the information is harmful.

8 What case or cases with that fact pattern do you think
9 are most persuasive? I know the general rubrics of standing.
10 Trust me.

11 MR. BARNEA: Of course.

12 THE COURT: But what case or cases do you think are
13 comparable?

14 MR. BARNEA: Well, I think the *Phillips* case from the
15 Ninth Circuit is useful, in that their information was
16 allegedly procured in violation of the Constitution and,
17 granted, in different circumstances than what we're talking
18 about here. And the court noted that in order for a plaintiff
19 to seek expungement of that information, the plaintiff has to
20 allege a potential future harm or imminent future harm that
21 they expected the government to use this information in some
22 way, so they could seek injunctive relief.

23 Again, it is clear that a person experiencing what
24 they allege to be a Fourth Amendment violation is an injury,
25 but it is a question as to whether it is ongoing or future

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1 imminent injury, as opposed to simply a past injury.

2 There is no case that we have that's on directly on
3 point to a one-time event that occurred many years with
4 apparently nothing having happened in the interim.

5 The cases that plaintiffs rely on, for example, *ACLU*
6 *v. Clapper*, is very much the opposite. The Second Circuit's
7 decision there involved an ongoing program in which every day,
8 the government was receiving telephone metadata including
9 all -- all Americans' telephone metadata, including necessarily
10 the plaintiffs, and was consistently querying that information
11 was necessarily involved as the court found looking through the
12 database in which the plaintiffs' data was contained. And so
13 that, there, I don't think there is any question that there is
14 an ongoing injury that the court could find standing for the
15 plaintiffs to challenge.

16 But, I don't know how *ACLU v. Clapper* would have come
17 out if the plaintiffs there had alleged a single incident of
18 information being taken years ago, yet they are seeking forward
19 looking injunctive relief.

20 THE COURT: *ACLU v. Clapper* talked about not only the
21 collection of the information, but the maintenance in the
22 government's database.

23 MR. BARNEA: Right, and again, maintenance there I
24 think is different from what we are talking about the
25 allegations in this case. In that case, the maintenance was an

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1 actively used and regularly accessed database that was, as
2 described in the Second Circuit's opinion, one that the
3 government regularly looked at and necessarily, by consistently
4 examining that database, was sort of necessarily looking
5 through, among other many other records, the plaintiffs' own
6 records.

7 So it wasn't simply that it existed at the bottom of a
8 file cabinet somewhere. It was that it was maintained and in
9 active use by the government over time.

10 THE COURT: Okay. Go ahead.

11 MR. BARNEA: Even if the plaintiffs had standing to
12 bring their claim, they cannot allege a Fourth Amendment
13 violation, because the Fourth Amendment is not applicable to
14 the alleged conduct at issue. In order for the Fourth
15 Amendment to apply to the conduct of foreign persons, the U.S.
16 government must play a sufficient role in controlling or
17 directing those foreign persons' actions.

18 Here, plaintiffs have not alleged sufficient facts
19 that, if proven, would establish that the CIA controlled or
20 directed the Spanish defendants. Plaintiffs assert that the
21 Spanish defendants were approached by intermediaries,
22 supposedly on behalf of the CIA, to conduct surveillance on
23 Assange and his visitors. They claim that the CIA provided
24 some technical assistance in implementing that surveillance,
25 and they claim that the CIA promised contracts or remuneration

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1 in exchange for the provision of that information.

2 None of those allegations, even assuming their truth,
3 establish that the CIA controlled or directed the actions of
4 the Spanish defendants.

5 The Second Circuit has already has articulated and
6 applied the relevant standard in several cases involving U.S.
7 government requests for information from foreign police forces
8 and never found it to be satisfied. Those cases include the
9 *Lee, Getto, and Gasperini* cases.

10 The fact that the U.S. government requested
11 information from a foreign police force is not sufficient to
12 implicate control or direction by the U.S. government, nor is
13 it enough if a foreign police shares the results of the search
14 with the United States government, including through a live
15 video feed. The court has further concluded that the U.S.
16 government's provision of money, equipment, and training --

17 THE COURT: The contemporaneous monitoring was done
18 from the United States, wasn't it?

19 MR. BARNEA: In which case? In the *Getto* case?

20 THE COURT: No, no, in this case allegedly.

21 MR. BARNEA: I don't think they specified the
22 location, but I imagine that is what they're claiming. I
23 believe that would be the same also in the *Getto* case.

24 THE COURT: So, U.S. agents were monitoring the feed
25 in the United States, and that's not sufficient involvement by

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1 the government?

2 MR. BARNEA: The question is not -- the relevant test
3 is not involvement by the government, but control and direction
4 over the foreign actor by the U.S. government.

5 So, the question is were the people who were doing the
6 actual searches and seizures abroad controlled and directed by
7 the U.S. government in the relevant sense in order to implicate
8 the Fourth Amendment. And I was simply going over the various
9 ways that the court has found do not satisfy that standard,
10 including the U.S. government's provision of money, equipment,
11 and training to the foreign police force, which also does not
12 implicate the U.S. government in their actions, as well as the
13 fact that the search by the foreign government was at the
14 request of the U.S. government or that the results of the
15 search or a live feed of whatever it was, was provided to the
16 U.S. government.

17 THE COURT: Why isn't there at least an issue of fact
18 as to what the involvement of the government was?

19 MR. BARNEA: Well, this is not a question of fact. We
20 are saying that if you look at the allegations in the
21 plaintiffs' complaint of the CIA's involvement here, it does
22 not rise to the level that would satisfy the standard. So
23 we're not questioning for this purpose what those allegations
24 are or the truthfulness of the allegations. The question is
25 have they alleged a sufficient role for the CIA that would

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1 demonstrate that the CIA, assuming those allegations were
2 ultimately proven true, controlled and directed the actions of,
3 here, the Spanish defendants.

4 And in our view, as a matter of law, those allegations
5 are insufficient, because they have not established that the
6 CIA controlled and directed. They have established that the
7 CIA may have asked for information and may have provided
8 technological assistance and may have offered something in
9 return if the information was provided. But in our view, that
10 simply is not control and direction.

11 THE COURT: Why isn't it at least direction? Is it
12 sufficient for direction without control?

13 MR. BARNEA: Well, the Second Circuit uses the sort of
14 combined phrase "control and direction," and I have to say that
15 given that the Second Circuit has never found this standard to
16 be satisfied, nor have I found any District Court cases that
17 have found it to be satisfied, it is hard to identify exactly
18 what circumstances would satisfy the standard.

19 We can all hypothesize when, if someone was literally
20 essentially working as a contractor for a federal agency or
21 something like that, you might conclude it was satisfied. But
22 it's hard to say exactly how the Second Circuit or when the
23 Second Circuit would find the standard to be satisfied, given
24 that we have never seen a case where it was.

25 THE COURT: Okay.

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1 MR. BARNEA: Even if the Fourth Amendment applied,
2 plaintiffs cannot claim a Fourth Amendment violation with
3 respect to plaintiffs' alleged conversations with Assange at
4 the embassy, their passports and the exteriors of their
5 electronic devices, because they did not have a reasonable
6 expectation of privacy.

7 The Fourth Amendment's protections only apply when a
8 person reasonably believes that their conversations are private
9 from others, or that no one else has access to the items at
10 issue.

11 As explained in our briefs, courts have repeatedly
12 held that, because government buildings and the like so
13 commonly have security cameras and other surveillance equipment
14 in them, both visible and invisible to visitors, there is no
15 reasonable expectation of privacy in such a facility, unless
16 the person is given explicit assurances of privacy.

17 Thus, for example, in a police station, courts have
18 held there is no reasonable expectation of privacy in any part
19 of the building, even when there are no other people around,
20 and when there are no visible cameras or microphones, except
21 when the person is told that a particular place is private.
22 Like the rooms where arrestees are told they can meet with
23 their lawyers confidentially.

24 Similarly, plaintiffs concede it is reasonable to
25 assume there is some surveillance cameras and the like in a

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1 foreign embassy. That defeats their claim since they do not
2 allege that anyone at the embassy told them they would be able
3 to have private unmonitored conversations with Assange.

4 Plaintiffs' argument they didn't know their
5 information would be shared with the CIA specifically is a red
6 herring. The relevant question is not whether plaintiff had a
7 reasonable expectation that their information would not be
8 shared with the U.S. government. Rather, it is whether they
9 had a reasonable expectation that their communication was
10 private, and that no other people could have been listening to
11 it, regardless of who those other people might have been or the
12 purpose for which they might have been listening.

13 This is why no one has a reasonable expectation of
14 privacy in a conversation taking place in Penn Station, even if
15 they didn't know that an undercover officer was eavesdropping
16 on them.

17 As for their passports and the exteriors of their
18 electronic devices, the law is clear that simply turning them
19 over to the embassy's security desk eliminates their
20 expectation of privacy in those items. This is so regardless
21 of whether they knew or had reason to believe that the security
22 desk might further share these items with anyone else.

23 As a related point, even if they had a reasonable
24 expectation of privacy, plaintiffs' communications with Assange
25 would not violate the Fourth Amendment, because any

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1 surveillance of such communications would have been reasonable.
2 As the Second and Ninth Circuits have explained, the Fourth
3 Amendment doesn't apply at all to searches of foreign citizens
4 outside the United States. And as long as the search -- as
5 long as the search of such a foreigner abroad is generally
6 reasonable, then it does not violate the Fourth Amendment for
7 the U.S. government to capture the foreigner's communications
8 with U.S. persons. No warrant or other approval is needed for
9 the U.S. government to monitor a foreign person's
10 communications, even when those communications are with U.S.
11 persons. As long as the U.S. government is legitimately
12 monitoring the foreign person's communications, and not using
13 that as a pretext to monitor the U.S. person's communications,
14 this does not violate the Fourth Amendment.

15 Here, Assange was a foreign citizen located outside
16 the United States, so the Fourth Amendment doesn't apply to any
17 surveillance of him. He was also being investigated at the
18 time for various criminal acts, so any surveillance of him
19 would have been reasonable. It follows that if such
20 surveillance captured his communications with U.S. persons,
21 that would not run afoul of the Fourth Amendment.

22 As for plaintiffs' *Bivens* --

23 THE COURT: But you take us up to the point where the
24 plaintiffs allege that the contents of their electronic devices
25 were seized. And you don't seem to dispute in your papers that

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1 a warrant would be necessary to seize the contents of the
2 electronic devices.

3 MR. BARNEA: I don't believe that a warrant is ever
4 required outside the United States. The Second Circuit has
5 held that the warrant requirement of the Fourth Amendment only
6 applies within the United States.

7 THE COURT: What case is that?

8 MR. BARNEA: The Bombing in East Africa -- I'm sorry.
9 U.S. Embassy Bombings in East Africa, among others, have held
10 that the warrant requirement specifically of the Fourth
11 Amendment does not apply extraterritorially. There is
12 nonetheless a reasonable requirement that applies from the
13 Fourth Amendment to surveillance by the U.S. government of U.S.
14 persons abroad.

15 THE COURT: No, no, no. We're talking about the
16 plaintiffs' allegation that their electronic -- they left their
17 electronic devices as well as passports, and that the outside
18 were copied. And you said no expectation of privacy with
19 respect to that.

20 And then there is the section that deals with the fact
21 that the plaintiffs allege that the contents were copied. And
22 the only response that I saw in your papers was not no warrant
23 is required outside the United States. You assume that a
24 warrant is required for the contents of Americans' electronic
25 devices that are left at the embassy abroad. But you say the

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1 plaintiffs haven't alleged that no warrant was obtained.

2 MR. BARNEA: That's not precisely what we argued, but
3 if I am allowed to clarify.

4 THE COURT: Sure.

5 MR. BARNEA: This may be of limited importance given
6 what I am going to say. But, I don't think that we ever
7 conceded that -- I mean, to be clear, the warrant requirement
8 of the Fourth Amendment does not apply abroad. I think our
9 argument on this point was that when the plaintiffs say that
10 the search was illegal, that is simply a conclusory statement.
11 They have not alleged in what way it is illegal. And we gave
12 examples of domestic cases where there were more specific
13 allegations of whether a warrant was required or a warrant was
14 obtained improperly.

15 In any event we actually, we rereviewed the
16 plaintiffs' opposition brief, and in a footnote they mentioned
17 a potential amendment that they might seek to make of their
18 complaint in this regard, which we had missed before, because
19 it was sort of buried in a footnote. But if they had made that
20 kind of an allegation, I'm not sure we would have made a
21 similar argument having to do with what they viewed as the lack
22 of need for a warrant or the unreasonableness of the search,
23 and so that potentially could cure that particular objection,
24 that particular aspect of our motion.

25 THE COURT: I frankly don't understand what you just

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1 said.

2 MR. BARNEA: Okay. I'm happy to answer any questions
3 about it.

4 THE COURT: So let's take it from the top so to speak.
5 I had thought your brief did not dispute that a
6 warrant is required for the contents of electronic
7 communications. And certainly there is case law in the United
8 States that stands for that proposition. You need a warrant in
9 order for the government to seize the contents of a phone.

10 MR. BARNEA: Right. In the United States, the
11 government needs a warrant to seize the contents of a phone.

12 THE COURT: And I read your papers as saying the
13 plaintiffs haven't alleged in their papers that no warrant was
14 obtained in this case. And therefore, they have failed to
15 state a claim for a violation of the Fourth Amendment. And
16 that's the way in which I read your papers.

17 You're telling me, no, that's not what you said. I'll
18 go back and read your papers with much more care. They were
19 read with care initially.

20 MR. BARNEA: No doubt, your Honor.

21 THE COURT: That of course raises the next question,
22 which is the government should know whether a warrant was
23 obtained or not. What you're telling me now is, I think, the
24 implication of what you're telling me is of course there was no
25 warrant. No warrants are required to seize the contents of a

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1 phone from an American citizen abroad.

2 MR. BARNEA: So, allow me to try to clarify my
3 statement, and I apologize if I wasn't clear earlier.

4 The constitutional warrant requirement of the Fourth
5 Amendment does not apply outside the United States. So, as a
6 result of the Constitution, no warrants are required for any
7 searches that occur outside the territory of the United States.
8 There are certain statutory provisions that may --

9 THE COURT: Okay. Let's pause there. And you rely on
10 East Asia Bombings?

11 MR. BARNEA: East Africa Embassy Bombings sets out
12 relatively clearly. I think other cases, *Hasbajrami*.

13 THE COURT: Did you cite East Africa Bombings?

14 MR. BARNEA: It is cited in one of our briefs.

15 THE COURT: No, in your initial brief.

16 MR. BARNEA: I'm trying to remember what brief we
17 cited it in.

18 THE COURT: It doesn't appear in your table of --

19 MR. BARNEA: It's in re -- let me find it.

20 THE COURT: If it's In re East Africa Bombings, it's
21 not in your initial brief.

22 MR. BARNEA: It might be in the reply brief then.

23 THE COURT: Okay.

24 MR. BARNEA: *In re Terrorist Bombings of U.S. Embassy*
25 *in East Africa* cited on page 8 of our reply brief.

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1 THE COURT: So, you say no warrant was required.

2 MR. BARNEA: Here it is on page 8 of our reply brief.

3 This is a Second Circuit case from 2008, holding that the
4 Fourth Amendment's warrant clause has no territorial
5 application and that foreign searches of U.S. citizens
6 conducted by U.S. agents are subject only to the Fourth
7 Amendment's requirement of reasonableness.

8 THE COURT: So, in your initial brief you argued, I
9 thought, again, I'll go over it, that the plaintiffs failed to
10 argue that there was no warrant for the seizure of the contents
11 of the cell phones.

12 Did I misread that argument?

13 MR. BARNEA: We argued that they simply posited that
14 the search was illegal, but did not specify in what way it was
15 illegal, such as, for example, if they thought a warrant was
16 required, to explain what warrant might have been required, and
17 why it wasn't obtained or how it was obtained improperly.

18 So the perhaps that's why our brief was confusing for
19 your Honor, and I apologize for saying that.

20 THE COURT: That certainly does suggest that the
21 problem with their complaint was the failure to allege that a
22 warrant was obtained. So, but your argument is no warrant was
23 required.

24 MR. BARNEA: No warrant was required by the
25 Constitution.

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1 THE COURT: So, can I take it from your argument that
2 the government concedes that there was no warrant that was
3 obtained, because no warrant was required?

4 MR. BARNEA: Again, certain statutes may require
5 warrants in certain circumstances, even if the Constitution
6 doesn't mandate it.

7 We neither concede nor have any statement about
8 whether any warrant was needed or was obtained in this case,
9 because of course none of the facts of this case we are having
10 any factual comment on them.

11 I think our point was meant to be, and again, this is
12 not a point that we think we need to pursue much given the
13 statement that we saw about a potential amended allegation that
14 the plaintiffs might make in this regard.

15 But our point was simply that by claiming that the
16 search was illegal without explaining why it was illegal, the
17 plaintiffs had not -- were making a conclusory statement
18 without actually justifying the pleading that they were trying
19 to make.

20 THE COURT: Here's my problem with that argument. The
21 government knows whether a warrant was obtained or not
22 obtained. If the government knows that there was no warrant,
23 then I wonder whether in good faith the government can make the
24 argument that ah-ha you haven't alleged that no warrant was
25 obtained, when the government knows as a matter of fact that no

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1 warrant was obtained.

2 MR. BARNEA: Again, we're not here to -- I'm not at
3 liberty to comment about whether a warrant was required or was
4 obtained, whether it was required by statute or by the
5 Constitution or something else.

6 THE COURT: But, here's --

7 MR. BARNEA: Again, we never --

8 THE COURT: Hold on.

9 MR. BARNEA: Sorry.

10 THE COURT: Here's my problem with making that
11 argument, just to be clear. It's not clear to me whether the
12 government can argue in good faith, without any explanation,
13 with respect to some of the defenses that the government
14 sometimes raises, that it is a matter of national security
15 simply to say we cannot affirm or deny whether there was a CIA
16 offices in that particular country.

17 When the government tells me in this case that simply
18 that they haven't alleged that there was no warrant, when the
19 government knows full well whether there was a warrant or not,
20 seems to me stretching the bounds of good faith. I mean, it
21 doesn't seem that that's an argument that the government could
22 make when the government knows full well that hypothetically
23 there was no warrant because it's not required under the
24 Constitution. Putting aside for a moment whether it was
25 required under any statute. Do you follow at least my --

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1 MR. BARNEA: I understand. And again, this is not an
2 argument that we're pressing in light of a -- or that we think
3 that this argument may well be solved by a statement in their
4 opposition brief that we initially overlooked, so this is not
5 an argument that we're pursuing. But in --

6 THE COURT: What's the statement that you overlooked
7 and that I may have overlooked also?

8 MR. BARNEA: Page 14, footnote 10 of the opposition
9 brief.

10 THE COURT: One of my favorite footnotes.

11 MR. BARNEA: Which has to do first with about whether
12 or not we had raised certain issues in our premotion letter,
13 and later on in the same footnote, they proposed how they might
14 have amended their complaint to deal with this particular
15 argument, and they assert that this argument could have easily
16 been corrected in the first amended complaint as there was no
17 search warrant in existence -- I'm sorry.

18 THE COURT: I see it.

19 MR. BARNEA: That the plaintiffs were aware of no
20 basis for obtaining a search warrant for plaintiffs.

21 Again, without a statement -- it is a little
22 complicated, but in any event, our argument was not based on
23 specifically whether a search warrant specifically was
24 available, but rather whether there was any basis to the
25 allegation of the search being illegal. Our objection was

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1 simply to the legal conclusion of the search having been
2 illegal, without any explanation as to why they concluded that
3 the search was illegal.

4 THE COURT: So, assume that the plaintiffs now say
5 that there was no search warrant. And the response is? Hasn't
6 been briefed.

7 MR. BARNEA: Well, again, if they said something along
8 the lines of we are not aware of any search warrant, and in any
9 event, the search that was conducted was not reasonable, and in
10 our view, that would cure the pleading defect that we
11 identified and would allow that particular claim to survive.
12 Assuming that the Fourth Amendment applied and they had
13 standing to bring it, which of course there are objections to
14 that particular claim.

15 THE COURT: All the plaintiff has to do to make this
16 claim survive is to allege that there was no search warrant,
17 and a search warrant was required to make the search
18 reasonable.

19 MR. BARNEA: Well --

20 THE COURT: You say if the plaintiff had only said
21 that, this claim proceeds.

22 MR. BARNEA: No. I said if they had standing, and if
23 the Fourth Amendment applied at all, which in our view it does
24 not, because the search at issue was conducted by a foreign
25 actor who was not controlled and directed by the CIA.

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1 But if the plaintiff can overcome those two issues,
2 and the only issue was whether they had adequately pleaded a
3 Fourth Amendment violation with regard to someone taking their
4 cell phones, then, in our view, an allegation that they are not
5 aware of any search warrant being obtained, they are not aware
6 of -- and in their view, the search was unreasonable, either
7 because of an absence of a search warrant or for other
8 circumstances, that may well cure the particular pleading
9 sufficiency that we identified in our brief. We would have to
10 study precisely what they would allege in that regard. This is
11 why we think it would be relatively easy to overcome that
12 particular argument, which is why I wasn't planning to focus on
13 it today.

14 THE COURT: I'm sorry, you think it would be
15 relatively easy to overcome that argument?

16 MR. BARNEA: We think that if they made that type of
17 an allegation, it would resolve that particular aspect of our
18 motion to dismiss, in all likelihood. Which is why we are not
19 focusing on that aspect of our motion to dismiss.

20 THE COURT: Well, there is a fully briefed motion. It
21 includes an argument that the plaintiffs have no claim with
22 respect to the seizure of the contents of their electronic
23 devices abroad. And you argued that that claim falls in part
24 because they haven't alleged the absence of a warrant.

25 MR. BARNEA: No. All they had alleged, all they

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1 allege in their complaint is that someone took their phone and
2 it was, quote, illegal. That was all they alleged.

3 So, what we point out was, by simply labeling
4 something illegal, that is a conclusory statement. They
5 haven't explained why it is illegal. And now, in this footnote
6 they have demonstrated what it is they might argue or how they
7 might plead more specifically why it was illegal, and I was
8 trying to explain to the Court why, in our view, if they were
9 to amend their complaint along these lines, that may well
10 resolve the concern that we had raised.

11 It was simply about the conclusory nature of the label
12 "illegal" being applied to something, without any explanation
13 as to what about the search was illegal or why it was illegal.

14 THE COURT: Okay. I'll revisit this of course with
15 the plaintiffs in a moment, but it would seem to me
16 unnecessarily wasteful to tell the plaintiffs file a motion to
17 dismiss, denied, or granted, with leave for the plaintiff to
18 file an amended complaint which includes more specific
19 allegations with respect to the seizure of the contents of the
20 electronic devices.

21 I mean, there is a fully briefed motion that should be
22 decided, and for the reasons that I've suggested, I didn't find
23 the briefing very clear on that.

24 MR. BARNEA: Apologies, your Honor.

25 THE COURT: No, no, never apologize. It would seem to

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1 me that plaintiffs could simply file an amendment to the
2 complaint with respect to their specific claims with respect to
3 the seizure of the contents of the electronic devices. And the
4 government would have the opportunity to file a motion directed
5 to that amendment, and the plaintiffs could respond, the
6 government could reply, rather than repleading the entire
7 motion.

8 MR. BARNEA: Your Honor, we don't think that the Court
9 is even going to have to reach those issues necessarily, given
10 our fundamental standing and inapplicability of the Fourth
11 Amendment. But if the Court wishes for us to examine a
12 proposed new pleading, we're happy to do so. And as I've
13 already said, it seems likely that they would be able to
14 satisfy us in this regard. So, this may be not much of an
15 exercise at all.

16 THE COURT: Okay. Go ahead. You may have just been
17 about concluded.

18 MR. BARNEA: Yes, well, I was just getting to the
19 *Bivens* point. Let me find my notes.

20 THE COURT: I fully appreciate that this is a new area
21 for *Bivens*, that it's never been applied in the context of
22 national security and abroad. And that there are reasons to
23 believe that Congress wouldn't believe that a *Bivens* remedy
24 would be appropriate under the circumstances of this case,
25 given the administrative remedies that are available.

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1 MR. BARNEA: Precisely. That is exactly our argument.
2 That this is not an area in which any Court could reasonably
3 conclude that Congress wanted the judiciary to create a remedy,
4 as opposed to limiting itself to the remedies Congress itself
5 has created, which include this very lawsuit against the CIA,
6 options to complain to the CIA's Office of Inspector General
7 and the like, which are very similar to the types of alternate
8 remedies that the Supreme Court has recognized as sufficient
9 alternate remedies in other proposed *Bivens* cases, and rejected
10 the *Bivens* remedy.

11 So, seems like our argument is relatively
12 straightforward in that regard. So, those are the only points
13 I wanted to make. I'm happy to answer any further questions
14 that your Honor might have about our arguments.

15 THE COURT: No. You weren't going to touch on
16 qualified immunity? I know the argument of qualified immunity.

17 MR. BARNEA: I am happy to summarize it for the Court.

18 THE COURT: No.

19 MR. BARNEA: I had selected a few of our arguments I
20 wanted to highlight in the argument today.

21 THE COURT: I'm familiar with the qualified immunity
22 argument.

23 MR. BARNEA: And at bottom, we are talking about
24 whether there is sufficient allegations of Mr. Pompeo's
25 personal involvement in the alleged acts, and we simply think

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1 an examination of the complaint, putting aside conclusory
2 statements of Mr. Pompeo approving things or directing things
3 which have been held in other cases to not be sufficient, are
4 simply not sufficient to implicate him personally. So
5 therefore, even if there were a *Bivens* remedy, he would be
6 entitled to qualified immunity for lack of personal
7 participation.

8 THE COURT: Okay. Thank you.

9 MR. BARNEA: Thank you, your Honor.

10 THE COURT: Plaintiffs.

11 MR. LEVENSON: Good afternoon, your Honor. This is
12 Brian Levenson for the plaintiffs.

13 There is no doubt that the plaintiffs have standing to
14 pursue this case under settled Second Circuit law, notably the
15 *ACLU v. Clapper*. The Second Circuit has held that the
16 collection, maintenance, and retention of seized information in
17 a government database is sufficient for standing to pursue a
18 claim. Whether or not that claim ultimately prevails is
19 different than whether or not the plaintiffs have standing to
20 pursue it.

21 The government relies on *Phillips*, which is a Ninth
22 Circuit case and not binding on this Court. Further, *Phillips*
23 is easily distinguishable on many grounds, including the
24 plaintiffs in that case were migrants as part of a caravan
25 coming to the United States who do not enjoy Fourth Amendment

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1 rights, the information in the government database was
2 independently created by the government, it was not seized from
3 any of the plaintiffs in that case, and the plaintiffs migrants
4 wanted the destruction of that information that was
5 independently collected and gathered by the government.

6 This case has no resemblance, even if it was
7 controlling. These are U.S. citizens, protected by the Fourth
8 Amendment, even abroad. And the government, without a warrant,
9 though it may not have been specifically pled in the complaint,
10 it was pled without authorization, unconstitutionally and
11 illegally, seized not only the content of their electronic
12 devices, laptops, cell phones, but also recorded private
13 conversations between the plaintiffs and Julian Assange, the
14 plaintiffs being lawyers and journalists.

15 There is case law, including cases cited by the
16 government, that there is a higher expectation of privacy with
17 respect to attorney-client communications. The plaintiffs had
18 no idea that their cell phones and laptops would be searched at
19 an embassy in London.

20 And further, the government has raised the argument
21 that they should assume there is some level of lack of privacy.
22 But that's not what's required. Absolute privacy, absolute
23 solitude is not the standard. It is reasonable. Was it
24 reasonable. They would not have brought electronic devices
25 carrying every bit of their lives with them or engaged in those

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1 conversations in that room had there been any expectation that
2 the CIA was listening.

3 THE COURT: Could we divide all of that up.

4 MR. LEVENSON: Okay.

5 THE COURT: There are arguments with respect to what
6 you can expect reasonably with respect to surveillance at an
7 embassy abroad. But, you've mixed up, if you will, in the same
8 sentence, the surveillance that occurred abroad, and the search
9 of the contents of their electronic devices that include lots
10 of things that went beyond simply the surveillance at the
11 embassy.

12 And the government initially said you didn't specify
13 how that search of the electronic devices was unreasonable or
14 without a warrant. And when you go back and forth from the
15 footnotes and listening to the government today, if you made a
16 few more allegations with respect to the seizure of the
17 contents of the electronic devices, the government has
18 indicated that, at least as I understood it, that part of the
19 specific argument that related to the seizure of the contents
20 of the electronic devices would fall out.

21 What I was trying to say to the government was, there
22 should be a simple way for the plaintiff to add some additional
23 allegations to the complaint to which the government might not
24 have the same additional argument that it had raised to the
25 seizure of the contents of the electronic devices, and we can

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1 move on without having a whole new briefing of the entire
2 motion.

3 I mean, I can accept a letter which, you know, amends
4 the allegations in the complaint, and a government response as
5 to what the argument, if any, is with respect to that amended
6 allegation, and decide the entire motion without having leave
7 to file an amended complaint, deny the initial motion as moot
8 because there is an amended complaint.

9 Doesn't that make sense to you?

10 MR. LEVENSON: Yes, it does, your Honor. That's what
11 we proposed in footnote 10, to the extent this was really an
12 issue.

13 THE COURT: Okay. So, what do you propose
14 specifically?

15 MR. LEVENSON: Yes, a letter amendment. We could
16 just -- without amending the entire complaint, we can amend a
17 specific paragraph or just include additional allegations
18 sufficient to show that the search and seizure was unreasonable
19 and without a warrant to satisfy the government.

20 THE COURT: The search and seizure of the contents of
21 the electronic devices.

22 MR. LEVENSON: Yes, your Honor.

23 THE COURT: And you would file that letter amendment
24 soon?

25 MR. LEVENSON: Within a week, your Honor.

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1 Thanksgiving eve.

2 THE COURT: Next week is Thanksgiving. So you can
3 take two weeks.

4 MR. LEVENSON: Thank you, your Honor.

5 THE COURT: And the government can file its response
6 December 8th.

7 MR. BARNEA: Thank you, your Honor.

8 THE COURT: And if there is any reply, December 13.
9 Okay?

10 MR. LEVENSON: Yes, your Honor. Thank you.

11 THE COURT: Great. So, go ahead.

12 MR. LEVENSON: So that tables the standing issue for
13 now as I take it.

14 With respect to the government's issues with a lack of
15 specificity in allegations of direct and control, the complaint
16 provides every piece of information about the government's
17 direction and control, including who, what, where, when, how,
18 and why.

19 It occurred at the SHOT convention in Las Vegas,
20 between the Las Vegas Assange security team at the direction of
21 the CIA recruiting U.C. Global and Morales, who already had the
22 contract for private security at the Ecuadorian embassy in
23 London. And the purpose was, we allege, a personal vendetta
24 between the director of the CIA, Mike Pompeo, against Julian
25 Assange.

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1 Mr. Pompeo in his first speech said that was his top
2 priority, that was what he addressed, is Mr. Assange was a
3 non-state hostile foreign actor, and WikiLeaks the same, and he
4 wanted to crush them more or less.

5 He goes on in his memoir containing additional
6 allegations against Mr. Assange that is not in the complaint,
7 that was published after, but that is the why, and the how is
8 the most specific thing. That the CIA provided software,
9 written in English, to U.C. Global, the security company who
10 had the embassy contract, about how to install real live time
11 feed surveillance of Mr. Assange at the direction, approval,
12 and authorization of Mike Pompeo.

13 It is unclear what more the plaintiffs could have
14 alleged when we don't know the ins and outs of the secret
15 clandestine attempt to surveil not only Mr. Assange, but anyone
16 who comes in contact with him, whether it is a journalist, a
17 lawyer, a doctor, who the complaint alleges were the targets of
18 this. And it was not a one-time thing. It was ongoing. The
19 complaint identifies over 100 Americans visited Mr. Assange at
20 the embassy, including actress Pamela Anderson who it later
21 came out that video of Ms. Pamela Anderson with Julian Assange
22 in this conference room was on David Morales's laptop in a
23 folder marked CIA.

24 Again, that information was published after the
25 complaint, but it's included in our briefing, because it

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1 certainly connects the plausibility that Mr. Pompeo and the CIA
2 were at the direction and control -- were directing and
3 controlling the security team at the embassy, U.C. Global, that
4 they reported, and they were in fact, they're on payroll. This
5 was paid for.

6 The government made the argument, oh, there is no
7 problem if foreign governments want to share information. This
8 was not a foreign government. This was a private security
9 contract. These are not government actors. These are regular
10 people who have a security contract at a London embassy. This
11 is not information sharing among nations. This is private
12 actors on the payroll, bought and paid for by the CIA.
13 Recruited by Mike Pompeo and under his supervision. The CIA
14 directed and controlled this operation.

15 The clincher, the plausible, undeniable, is also in
16 our brief at the very end, through reporting that came out
17 again after the complaint, was that the U.S. government within
18 hours disrupted a conversation between Mr. Assange and the
19 Ecuadorian government that would provide him diplomatic status,
20 within hours it was disrupted. That could only be done with
21 real live time feed of that room and what was being discussed,
22 and it certainly makes clear it is not information sharing
23 between foreign government. This is was the Ecuadorian
24 government that was being spied on. And this was done by
25 private actors, David Morales and U.C. Global.

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1 So again, this is not a request for information from a
2 foreign government; it is not sharing by a foreign government.

3 With respect to reasonable expectation of privacy, I
4 started to address this, and your Honor was correct that I
5 should break it out. But *Riley v. California*, the U.S. Supreme
6 Court case from 2014, makes clear in fact the "With respect to
7 cell phones, get a warrant."

8 THE COURT: Right. That's with respect to the
9 contents of the cell phone.

10 MR. LEVENSON: Yes. That is the allegation in the
11 complaint.

12 THE COURT: No, no question. The complaint alleges
13 that the content of the electronic devices were in fact seized.

14 MR. LEVENSON: Yes.

15 THE COURT: And that a warrant is required under
16 *Riley*. There is the separate argument, because you also say
17 there was a Fourth Amendment violation because the materials
18 that the plaintiffs left at the desk, including their
19 passports, were also copied, and that that was a violation of
20 the Fourth Amendment.

21 MR. LEVENSON: The inclusion of the allegation
22 regarding passports was not an allegation of violating the
23 Fourth Amendment. That was an allegation to show that the CIA
24 was on notice these were American citizens.

25 THE COURT: Oh.

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1 MR. LEVENSON: At the time that they entered the
2 embassy.

3 THE COURT: So there is no allegation that the copying
4 of the materials that were left when the plaintiffs entered the
5 embassy was a violation of the Fourth Amendment.

6 MR. LEVENSON: Not the passport, your Honor. I want
7 to distinguish it from the electronic devices. It is a totally
8 separate issue, which that is a violation of the Fourth
9 Amendment.

10 THE COURT: The contents of the electronic devices.

11 MR. LEVENSON: Yes.

12 THE COURT: Not the outside of the electronic devices.

13 MR. LEVENSON: We are not alleging a Fourth Amendment
14 violation based on taking a picture of the outside of a
15 passport or a phone or a laptop.

16 THE COURT: Okay.

17 MR. LEVENSON: That is a tremendous fact in this case
18 that the search, that the seizure, were separated in time and
19 space, where they checked -- just as I came into the building
20 today and had to check my phone, the government knows who I am,
21 if I provided my passport, they know that I am an American
22 citizen, they have my phone, and *Riley* makes that off limits.
23 That's off limits.

24 THE COURT: I know that's the content of the phone. I
25 got it.

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1 MR. LEVENSON: I don't want to belabor the point, yes.

2 THE COURT: You also argue, I think, that the
3 surveillance of the meetings with Assange was also a Fourth
4 Amendment violation.

5 MR. LEVENSON: Yes, that's what I was going to. That
6 is a Fourth Amendment violation, because at the moment where
7 the plaintiffs checked into the embassy and checked their
8 devices, and provided their passport, the government in real
9 time knew these were American citizens about to enter the room,
10 the room is separated, they went in the room, and now they're
11 surveilling U.S. citizens without a warrant or without any
12 reason. There is no reasonableness. These are not criminals,
13 these are lawyers, doctors, physicians, journalists.

14 THE COURT: Is there any comparable case that says
15 there is a Fourth Amendment expectation of reasonable
16 expectation of privacy in a foreign embassy for an American
17 citizen who has a conversation in a foreign embassy? Any sort
18 of comparable case?

19 MR. LEVENSON: Your Honor, there is no case like this.
20 I'm not even going to analogize any other case. There are many
21 prison cases cited by the government, and we are just
22 dumbfounded by the comparison. This is not a prison. He is a
23 free person. Prisoners have no liberties, and of course there
24 is no reasonable expectation of privacy in a prison. These are
25 lawyers going to see a client at an embassy.

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1 THE COURT: The argument can certainly be made that
2 when people go into a foreign embassy, they would expect that
3 there is security in the embassy that would cover surveillance
4 in the same way that when you enter a courthouse, you can
5 expect there is surveillance.

6 MR. LEVENSON: Yes, of courses there is surveillance,
7 of course there are video cameras to keep track of who is in
8 the elevator and the hallway and in case something happens. Of
9 course, many buildings have surveillance. Any building would
10 have surveillance.

11 But this is different. This is a private meeting in a
12 separate room. These are not the public areas of that
13 building. These are not common areas. These are private
14 areas. And they're there to see a client or a source for an
15 article. There is a reasonable expectation that under these
16 circumstances, where they've identified themselves as Americans
17 from the get-go, that they are not going to be surveilled by
18 the CIA.

19 THE COURT: Why?

20 MR. LEVENSON: Because they've identified themselves
21 as American citizens.

22 THE COURT: So?

23 MR. LEVENSON: The government is relying -- telephone
24 wiretap cases involving terrorists. This is not a terrorist.
25 This is not someone who called terrorists and was accidentally

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1 picked up and, oh my God, that is an American citizen, what do
2 we do? It's okay, it is incidental overhear doctrine.

3 That's not what this is. It is separated. I am an
4 American citizen, I am going in that room to talk to that
5 person, I have a reasonable expectation that the government is
6 not listening.

7 THE COURT: There is no allegation in the complaint
8 that when the plaintiffs go into the foreign embassy they say,
9 we want a private room in order to be able to talk to this
10 person. These are going to be confidential discussions, we
11 don't want anyone listening. Got it?

12 Would a foreign embassy be expected to say, oh sure.
13 come on in, we'll give you a safe room.

14 MR. LEVENSON: No, that's not a reasonable
15 conversation. The extent of -- let me find the case. *Mankani*,
16 Second Circuit, 1984, the Fourth Amendment protects
17 conversations that cannot be heard except by means of
18 artificial enhancement, which is what this is. Tiny
19 microphones bugged on fire extinguishers, special devices put
20 on windows to obscure outside noises. That is the only way
21 these conversations could be heard. And that is what the
22 Fourth Amendment protects.

23 THE COURT: I assume *Mankani* is not in the context of
24 a foreign embassy abroad.

25 MR. LEVENSON: No. We were unable to find any case

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1 involving any foreign embassy. Any embassy.

2 THE COURT: Okay.

3 MR. LEVENSON: To be candid.

4 One thing I wanted to go back just to clarify about
5 plaintiffs' allegations concerning the copying of materials.
6 There is an allegation that the government dismantled a cell
7 phone and took a picture of something called an IMEI card on
8 the inside of the phone that permits the government
9 extraordinary amounts of information with that code. We do
10 allege that that's part of our claim for a Fourth Amendment
11 violation. That is on the inside of the phone, not the
12 outside.

13 THE COURT: Okay.

14 MR. LEVENSON: Finally --

15 THE COURT: The main argument with respect to the
16 individual liability.

17 MR. LEVENSON: Yes, *Bivens*, yes.

18 THE COURT: Right.

19 MR. LEVENSON: Yes, your Honor. We believe that this
20 is a *Bivens* claim. While *Bivens* was a search of a person in
21 their own home who is handcuffed and was permitted to sue for
22 damages, we believe this is worse. This is not just a search
23 of a home. This a search of a phone. A phone has
24 extraordinary amounts of information not available in a home.
25 I don't need to tell you, your Honor, what could be on a phone.

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1 GPS tracking location, health, medical records, client
2 documents, client information, journalistic sources, personal
3 pictures -- compromising pictures, in fact -- e-mails, personal
4 text messages. This is so far beyond the search of a phone.
5 *Riley v. California* made it clear that the phone is not -- is
6 off limits in this context. That was in 2014. These searches
7 occurred after. It was no doubt what the law was at the time
8 that these searches happened. *Bivens* was a Fourth Amendment
9 case as is this.

10 THE COURT: But all of that would appear to go to
11 whether there was a Fourth Amendment violation, and whether
12 perhaps there was qualified immunity after *Riley*, rather than
13 to the analysis of *Bivens*, which is whether the application of
14 the Fourth Amendment to a new circumstance that has not been
15 recognized by the Supreme Court. This is a long way away from
16 *Bivens* itself. And there are only three cases where the
17 Supreme Court has said, yes, that's a *Bivens* claim. We'll
18 recognize it. And the kinds of distinction that the Supreme
19 Court has drawn with respect to whether *Bivens* should be
20 extended to a new situation would seem to argue that it
21 shouldn't be extended here.

22 Your turn.

23 MR. LEVENSON: Sure. It's true there are only three
24 instances, three cases where the Court applies *Bivens*. That is
25 a case-by-case analysis. As I tried to argue, this is worse.

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1 This is so much worse. *Bivens* is a man in his home. Whatever
2 is in his home, is in his home. A phone has the data,
3 sensitive data, sensitive messages that may not be kept in a
4 home. It's a different circumstance only that rather than
5 occur in a home, it occurred in an embassy.

6 We fail to see how that's the line to be drawn as far
7 as whether this is a different context. It is the conduct that
8 is the same. It is an unreasonable extreme action taken by the
9 government at the direction of Mike Pompeo, and he is not
10 entitled to qualified immunity because *Riley v. California* made
11 it clear.

12 THE COURT: Separate argument from *Bivens*. Qualified
13 immunity, separate argument from *Bivens*.

14 MR. LEVENSON: Okay.

15 THE COURT: National security, broad.

16 MR. LEVENSON: There is no national security
17 implications with Ms. Hrbek or Ms. Kunstler. These are U.S.
18 citizens who are lawyers, who had long distinguished careers
19 representing clients either in entertainment transactions,
20 litigations, sometimes civil rights cases, journalists. These
21 are not terrorists. These are not terrorists. There is no
22 immediate harm to the country. These are not people crashing
23 the border. These are people going to see a client or
24 journalistic source in a room, with a reasonable expectation of
25 privacy. That's all this is. They are not terrorists, they're

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1 not on any watch lists, they are not on a no fly list. They
2 are just people, your Honor.

3 THE COURT: No one has suggested that they are. The
4 national security interests are from Mr. Assange, whether those
5 are correct or not, they are asserted. Right?

6 MR. LEVENSON: He is not the plaintiff in this case,
7 your Honor. His phone was not downloaded and searched. He was
8 not going to visit someone and have his conversations -- and
9 that's what I was getting at earlier. To the extent, putting
10 Mr. Assange aside, which you can, because at the moment they
11 walked in the door, they had done nothing other than they
12 announced their intent to visit him. Fellow journalist, a
13 client. And that is it.

14 THE COURT: Okay.

15 MR. LEVENSON: Thank you, your Honor.

16 THE COURT: Thank you.

17 Anything further?

18 MR. BARNEA: Thank you. I wanted to say a couple more
19 things about whether the plaintiffs had a reasonable
20 expectation of privacy in a foreign embassy.

21 Of course we also haven't been able to find any cases
22 specifically taking place in foreign embassies, since I guess
23 nobody has filed such a case that's been published on Westlaw
24 so far. However, there are plenty of cases, and we cite a lot
25 of them in our brief, that talk about different kinds of

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1 circumstances in which someone does not have a reasonable
2 expectation of privacy and why. And I wanted to just go over
3 briefly some of those.

4 It is right that a couple of them have to do with
5 jails, but I think a better analogy is police stations. So,
6 for example, there's a case involving the front desk of a
7 police station in which you have a circumstance where, when no
8 one else was present, two police officers had a conversation,
9 and they claim that the police department they worked for
10 placed a secret microphone under the desk and was recording
11 their conversations, and they sued. And the Court concluded
12 that they had no reasonable expectation of privacy because they
13 were in a police building, and it is an area that is open to
14 the public, and people come by, and it is not reasonable for
15 them to have an expectation of privacy in those circumstances.

16 Another case where the defendant was the Port
17 Authority was people were in a medical facility, no one else
18 was in the office with them, in the nurse office with them, the
19 nurse was not there. They thought they were having a private
20 conversation. They did not know there was a secret camera
21 installed in the room. And the Court held that they did not
22 have a reasonable expectation of privacy, because they were in
23 a medical facility, and people were going in and out of the
24 room, and people -- and this is not the type of a location
25 where people can expect to have privacy. Even though, as far

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1 as the people themselves were concerned, they were by
2 themselves, and they didn't see any surveillance equipment.

3 So the question is not did someone know that they were
4 being surveilled. The question is are you in a place where you
5 have sufficient assurances of privacy, either because you are
6 in your own home or in a private space that either you or the
7 person you are speaking to controls, or are you in a public
8 place or a government facility or some other facility that you
9 don't control. As your Honor suggested, this courthouse, there
10 are probably lots of security cameras all over the courthouse,
11 and therefore, unless you are put in a room where someone from
12 the court tells you, this is a private room where you can have
13 a conversation with your client, I don't think that anyone can
14 have a reasonable expectation of privacy outside of that
15 location.

16 Again, same thing happens in all sorts of government
17 facilities. It's true many of these cases have to do with
18 police departments, because that is a more frequent occurrence.
19 But the analogy to an embassy is very clear.

20 And your Honor, so for that reason, we believe there
21 was no reasonable expectation of privacy with regard to those
22 communications.

23 And just as a very small last point, about these IMEI
24 numbers on the phones. It's true that -- I'm certainly not a
25 cell phone expert, but it's true that these are numbers that

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1 are written sort of on a phone, but they are not the electronic
2 contents of the phone. But there are several cases, we cite a
3 few of them, that say that by giving your phone to someone
4 else, you have relinquished your expectation of privacy,
5 including in this IMEI number that is inscribed on your phone,
6 but is not part of the electronic contents of your phone.

7 THE COURT: I had taken the plaintiffs' argument to be
8 that they're claiming protection for the inside of the phone,
9 and they're referring to a card inside the phone.

10 MR. BARNEA: It is a physical card that is inserted
11 into the phone. So it is inside physically, but it is not the
12 electronic contents of the phone. So the Supreme Court's
13 prohibition on requirement of a warrant is to what is on your
14 phone. Your e-mails, your photographs, your files.

15 THE COURT: What is accessible from the inside of the
16 phone?

17 MR. BARNEA: What is accessible electronically on the
18 phone as opposed to the physical structure of the phone.
19 Serial numbers, little cards that are inside your phone that
20 may be what help your phone access cell phone service and the
21 like, those are not included within the Supreme Court's
22 admonition.

23 THE COURT: So SIM cards.

24 MR. BARNEA: Precisely.

25 THE COURT: Are not.

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1 MR. BARNEA: The information that you can see on the
2 SIM card. If the government were to download the contents your
3 SIM card, that would be different. But if the government were
4 to simply open up the SIM card slot and take a picture of it
5 and take down the SIM card number, that is not something that
6 requires a warrant, if you've voluntarily provided that phone
7 to the government or to somebody else. That's the distinction.

8 THE COURT: What cases do you rely on for that?

9 MR. BARNEA: I thought you might ask that.

10 It is on page 17 of our opening brief. *Ward v. Lee*
11 from the Eastern District of New York is a case that collects
12 several cases about this.

13 THE COURT: Okay. Thank you.

14 MR. BARNEA: Thank you, your Honor.

15 THE COURT: I'll take the motion under advisement, and
16 I look forward to the letter with the amendment and the
17 response and the reply. Thank you, all.

18 MR. LEVENSON: Thank you, your Honor.

19 THE COURT: I appreciated the briefs and the argument.

20 (Adjourned)
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24
25